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Supreme Court, U.S.
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No. 04-24

In The
Supreme Court of the United States

ARTHUR JONES, Chief,

Petitioner,

v.

OCTAVIO DELGADO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether the First Amendment protects a police detective's speech on a matter of public concern?

Whether a reasonably competent public official believed he was free to retaliate by transferring a detective to an unwanted and less desirable job position based on the detective's communication that was highly relevant to an independent and objective investigation of criminal activity that could result in the official being questioned as a part of the criminal investigation?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 7

I. This Court has Previously Defined First Amendment Protection for Speech that is Part of a Public Employee's Duties 7

II. The Seventh Circuit Rejected Jones' Request for Qualified Immunity Based on Clearly Established Law that his Conduct was Unlawful in the Situation He Confronted 20

CONCLUSION 28

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Auriemma v. Rice, 910 F.2d 1449 (7th Cir. 1990) 9

Branton v. City of Dallas,
272 F.3d 730 (5th Cir. 2001).....12, 13

Brewster v. Bd. of Educ. of the Lynwood Unified Sch. Dist.,
149 F.3d 971 (9th Cir. 1998).....16, 20

Ceballos v. Garcetti, 361 F.3d 1168 (9th Cir. 2004).... passim

Cockrel v. Shelbey County Sch. Dist.,
270 F.3d 1036 (6th Cir. 2001).....8, 15

Connick v. Myers, 461 U.S. 138,
103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) ..... passim

Delgado v. Jones, 282 F.3d 511 (7th Cir. 2002) ..... passim

Delgado v. Jones,
277 F.Supp.2d 956 (E.D. Wis. 2003)..... passim

Dill v. City of Edmond, 155 F.3d 1193 (10th Cir. 1998).....25

Dirrane v. Brookline Police Dept.,
315 F.3d 65 (1st Cir. 2002).....24

Flores v. Morgan Hill Unified Sch. Dist.,
324 F.3d 1130 (9th Cir. 2003).....21

TABLE OF AUTHORITIES -- Continued

Gilbrook v. City of Westminster,
177 F.3d 839 (9th Cir. 1999).....17

Glass v. Dachel, 2 F.3d 733 (7th Cir. 1993) 9

Gonzalez v. City of Chicago,
239 F.3d 939 (7th Cir. 2001)..... passim

Gustafson v. Jones,
117 F.3d 1015 (7th Cir. 1997).....22, 23, 27

Gustafson v. Jones, 290 F.3d 895 (7th Cir. 2002).....8, 9

Hope v. Pelzer, 536 U.S. 730,
122 S.Ct. 2508, 153 L.Ed.2d 666 (2002) 21, 27

Hufford v. McEnaney, 249 F.3d 1142 (9th Cir. 2001) 16

Johnson v. Multnomah County,
48 F.3d 420 (9th Cir. 1995).....16

Kinney v. Weaver, 367 F.3d 337 (5th Cir. 2004) 27

Koch v. City of Hutchinson,
847 F.2d 1436 (10th Cir. 1988).....11

Linhart v. Glatfelter, 771 F.2d 1004 (7th Cir. 1985) 10

Mitchell v. Forsyth,
472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).....20

Morris v. Crow, 142 F.3d 1379 (11th Cir. 1998).....12, 23

TABLE OF AUTHORITIES -- Continued

Pickering v. Bd. of Educ., 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) 15, 16

Rivera-Jimenez v. Pierluisi, 362 F.3d 87 (1st Cir. 2004)..... 27

Rivero v. City & County of San Francisco, 316 F.3d 857 (9th Cir. 2002)..... 16

Roth v. Veteran's Admin. of the United States, 856 F.2d 1401 (9th Cir. 1988)..... 16

Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151 (2001) 20

Stanley v. City of Dalton, 219 F.3d 1280 (11th Cir. 2000)..... 25

Taylor v. Keith, 338 F.3d 639 (6th Cir. 2003)..... 14, 15

Thomson v. Scheid, 977 F.2d 1017 (6th Cir. 1992)..... 13, 14

Weeks v. Bayer, 246 F.3d 1231 (9th Cir. 2001)..... 17

STATEMENT OF THE CASE

Respondent finds that petitioner's statement of the case does not contain a complete listing of the facts necessary to decide the petitioner's writ of certiorari, and now adds facts necessary to decide this petition. This is a case in which a police detective claims the City of Milwaukee's Police Chief violated his First Amendment rights by transferring him to an unwanted and undesirable position after the detective disclosed information from a letter he received from an arrested individual that disclosed the police chief was a close personal friend of a public official whose immediate relative was alleged to have frequented the arrested individual's drug house.

Respondent, Detective Octavio Delgado, began serving in the Milwaukee Police Department's Vice Control Division ("VCD") in 1998 where he was assigned as an undercover narcotics investigator. (Pet. App. 22). On March 22, 2000, a citizen complained to the City of Milwaukee Mayor's office about the existence of an alleged drug house located on West Wright Street. (Id.) The Mayor's office forwarded the citizen's complaint to VCD for investigation. (Id.)

In late April 2000, Delgado, as part of a drug entry team, searched the alleged drug house pursuant to a warrant. (Id.) During the search of the house, several individuals were arrested including a woman named Margaret Mullins. (Id.)

In May 2000, Mullins sent a letter specifically addressed to Delgado. Letters specifically addressed to VCD detectives are only opened by those detectives. (Record 46, at ¶ 2; Record 47, at ¶¶ 8-9; Record 53, Stelter Dep., pp. 40-

41). In this letter, Mullins said she had information about unlawful drug-related activity, including information about public school employees engaging in drug trafficking, a state employee living with a drug dealer, and the patronage of a drug house by a close relative of a public official. (Pet. App. 22) Mullins also stated that the public official whose close relative frequented the drug house was a close personal friend of the City of Milwaukee's Police Chief, Petitioner Arthur Jones. (Id.)

Delgado recognized that these allegations were sensitive because of the references to a public official and to Jones, but believed they should be investigated. (Id.) Delgado did not want to personally investigate this matter as he thought the investigation could best be accomplished by an outside law enforcement agency. (Id.) Had Delgado thrown away Mullins' letter at this point, no one would have known of its existence except for Mullins and Delgado. (Record 53, Stelter Dep., pp. 41-42). Further, Mullins had no access to a copy machine so had she claimed she sent a letter to Delgado that was not responded to, it would have been her word against his. (Id., at 41-43).

Nonetheless, Delgado discussed the Mullins letter with his partner, Detective Joseph Link, to get ideas on how to proceed forward with an investigation on Mullins' allegations. (Record 46, at ¶¶ 4,6). Link warned Delgado that any detective who investigated the charges in the letter might be transferred. (Pet. App. at 22-23). Link based his remarks on the fact that other VCD detectives were transferred for conducting an investigation that led to the arrest of the brother of the Deputy Police Chief. (Id., at 23). Delgado and Link decided that Delgado should bring the letter to the attention of their immediate supervisor knowing that by doing so the matter would go up the chain of command

which caused them concern. (Id.) Had Delgado decided to throw away the Mullins letter at this point, no one in the MPD would have known about Mullins' allegations except Delgado and Link. (Record 46, at ¶ 7; Record 47, ¶ 13).

Delgado then showed the Mullins letter to Lt. Stelter who read it and said something to the effect of what district did Delgado want to be transferred to. (Pet. App. 23). Stelter made this comment mostly as a joke, but referred to the widespread belief in the department that officers involved in investigations relating to Jones or to his command staff were transferred. (Id.) Lt. Stelter's comment reinforced Delgado's reluctance to investigate the matter himself and he told Stelter the matter should be referred to an outside agency for investigation. (Id.)

Stelter then requested that Delgado give him the Mullins letter so he could forward it to Captain Kenneth Meuler. (Id.) Upon receipt of the Mullins letter, Captain Meuler instructed Lt. Stelter to direct Delgado to interview Mullins and to write a report on the interview. (Id.) Stelter complied with Meuler's orders resulting in Delgado's compliance with these directives. (Id.)

Delgado then interviewed Mullins who identified the public official whose spouse allegedly frequented the drug house as a City of Milwaukee Alderman whose spouse was named John Odom. (Id.) The informant confirmed that Odom told her he was a good friend of Jones. (Id.) In addition, Delgado learned the identity of the Milwaukee public school teachers alleged to be using crack cocaine and marijuana, together with the identity of the individual who lived with the Assistant District Attorney and alleged to be selling crack cocaine in the City of Milwaukee. (Record 46, at ¶ 12; Record 47, at ¶ 17). Delgado kept notes concerning

this interview. (Record 53, at Dep. Ex. 3; Delgado Dep., pp. 101-103). After completing his interview of Mullins, Delgado completed a "Matter Of" report from the notes of his interview with Mullins for Captain Meuler. (Record 53, Delgado Dep., pp. 100-103). At no time prior to the start of this lawsuit, did Lt. Stelter or any of Delgado's superiors inspect his notes from his interview of Mullins. (Record 53, Stelter Dep., pp. 50-51).

Delgado then gave his "Matter Of" to Lt. Stelter who forwarded it to Captain Meuler. (Pet. App. 23). Captain Meuler then referred Delgado's "Matter Of" to Deputy Chief Ray along with his recommendation that the matter be referred to an outside agency for investigation. (Id., at 23-24). Deputy Chief Ray reviewed the information and expressed her disagreement with Meuler's recommendation and told Meuler that Jones would not be happy. (Id., at 24). Deputy Chief Ray then requested that Meuler provide her additional reports and the meeting ended with Deputy Chief Ray leaving to go to Jones' office with the reports provided by Captain Meuler. (Record 53, Meuler Dep., pp. 42-43).

Approximately two minutes after Captain Meuler left Deputy Chief Ray's office, he received a telephone call from Chief Jones demanding he go to the Chief's office. (Id., at 44). As Captain Meuler entered Jones' office, Jones was holding the reports provided to him by Deputy Chief Ray which the Chief used to point at Meuler and screamed, it was not for Meuler to decide if an investigation got referred to an outside agency, and that Meuler had no business making that recommendation or not giving the Chief this information sooner. (Id., at 44-45). Jones then screamed at Meuler that he believed Meuler was undermining his authority and referenced that this situation was similar to the one where officers were transferred after investigating drug activity by

Deputy Chief Ray's brother. (Pet. App. 24). Jones then asked Meuler, "Who the hell was Detective Delgado to think he would investigate this?" (Id.) Jones then told Captain Meuler that no one from the VCD should be involved in the investigation and he should turn over all reports concerning this investigation to Commander Schunk of the Internal Affairs Division ("IAD") who would handle the investigation. (Record 53, Meuler Dep., p. 49). Jones then told everyone in the room he was transferring Delgado and ordered Captain Meuler not to talk to Delgado about the transfer or to discuss the investigation and the citizen complaint against John Odom. (Id., at 50). Jones then ordered Captain Meuler not to talk to anyone about this investigation and made it clear it was his decision Delgado was to be transferred and the decision was done and over with. (Id., at 50-51, 55).

Commander Schunk of IAD recalled that Jones was angry that the information contained in Mullins' letter and Delgado's "Matter Of" was not brought to his attention sooner because of the allegations of criminal misconduct and the fact his name was mentioned in the report. (Record 53, Schunk Dep., pp. 36-39). After Meuler left Jones' office on May 18, 2000, Jones ordered Schunk to get detectives from IAD to interview Mullins. (Id., at 42). Schunk and IAD Criminal Investigation Unit detectives then interviewed Mullins at the Milwaukee County Jail. (Id. at 44-45). After completing this interview, Jones instructed Schunk to begin an internal rules investigation against Delgado. (Id., at 45-46). On May 19, 2000, Jones issued a written order transferring only Delgado retroactive to May 18, 2000. (Record 53, at Dep. Ex. 6).

On June 20, 2000, Captain Gregory Thompson of IAD found that the investigation into Mullins' allegations

that Delgado made mention of the Mayor's office while interrogating Mullins did not result in a violation of any confidentiality matter as Delgado did not divulge any specific names of complainants or witnesses. (Record 53, at Dep. Ex. 9).

Then on June 29, 2000, Delgado filed his Complaint in the United States District Court for the Eastern District of Wisconsin. (Record 1). On July 28, 2000, Commander Schunk ordered members of IAD to continue the investigation into Delgado for violating the MPD's confidentiality rule. (Record 53, at Dep. Ex. 13, p. 10).

On October 17, 2000, defendants filed a motion to dismiss Delgado's Complaint. (Record 20). In doing so, defendants claimed Delgado's Complaint failed to state a First Amendment claim arguing his speech was not protected as a matter of public concern, and alternatively, that Chief Arthur Jones and Deputy Chief Monica Ray were entitled to qualified immunity. (Record 21). On February 13, 2001, defendants' motion to dismiss was denied. (Record 31). Police Chief Arthur Jones and Deputy Chief Ray then filed an appeal requesting that the Seventh Circuit find Delgado's speech was not protected by the First Amendment and they were entitled to qualified immunity. (Record 32).

On March 8, 2002, the Seventh Circuit affirmed the district court's decision to deny defendants' motion to dismiss. Delgado v. Jones, 282 F.3d 511 (7th Cir. 2002); (Pet. App. 4-20). The defendants then filed a motion for rehearing and rehearing en banc which was denied by the Seventh Circuit on May 2, 2002. At the conclusion of the discovery in this case, Detective Delgado agreed to stipulate to the dismissal of Deputy Chief Monica Ray as a defendant. (Record 43). However, the remaining defendants, Police

Chief Arthur Jones and the City of Milwaukee filed a motion for summary judgment requesting dismissal of Delgado's complaint on the basis that Delgado's speech was not protected under the First Amendment and that Jones was entitled to qualified immunity. (Record 41-42). On August 11, 2003, the district court denied the defendants' motion for summary judgment. Delgado v. Jones, 277 F.Supp.2d 956 (2003). On September 10, 2003, Jones filed another appeal with the Seventh Circuit requesting reversal of the district court's denial of his motion for summary judgment arguing that Delgado was not entitled to First Amendment protection and that he was entitled to qualified immunity. (Record 62). On April 1, 2004, the Seventh Circuit Court of Appeals issued an order affirming the district court's denial of the defendants' motion for summary judgment. (Pet. App. 1-3).

Jones now files his petition claiming Delgado is not entitled to First Amendment protection as his speech arose out of his official duties as a public employee, and he is entitled to qualified immunity.

REASONS FOR DENYING THE WRIT

I. This Court has Previously Defined First Amendment Protection for Speech that is Part of a Public Employee's Duties.

This court has held:

> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters *only* of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the

> wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.
>
> Connick v. Myers, 461 U.S. 138, 147, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). (emphasis added).

The petitioner argues that the various circuit courts have taken this holding and inconsistently applied it requiring this Court to review this case to provide further definition as to what this Court meant when it said a public employee's speech as a citizen upon matters of public concern is protected.

However, the petitioner's request for review is misplaced because, "the key question is not whether a person is speaking in his role as an employee or citizen, but whether the employee's speech in fact touches on a matter of public concern." Cockrel v. Shelbey County Sch. Dist., 270 F.3d 1036, 1052 (6th Cir. 2001). The issue is whether a public employee is speaking on a matter of public concern versus matters of personal interest. Connick, 461 U.S. at 147, 103 S.Ct. 1684.

As a general rule, "[a] government employee's speech relates to a matter of public concern if it, 'can fairly be said to relate to a matter of political, social or other concern to the community, rather than merely a personal grievance of interest only to the employee.'" Delgado v. Jones, 277 F.Supp. 2d 956, 960 (E.D. Wis. 2003); *citing* Gustafson v. Jones, 290 F.3d 895, 907 (7th Cir. 2002). To determine if the speech is on a matter of public concern is dependent on its "content, form and context of [the speech] as revealed by the whole record." Gustafson, 290 F.3d at

906-907; *citing* Connick, 461 U.S. at 147-48. From this general rule, the Seventh Circuit has found content involving speech on "police protection and public safety are generally matters of public concern." Delgado v. Jones, 282 F.3d 511, 517 (7th Cir. 2002); see Auriemma v. Rice, 910 F.2d 1449, 1460 (7th Cir. 1990) (en banc). More specifically, "[I]t would be difficult to find a matter of greater public concern in a large metropolitan area than police protection and public safety." Id. Further, "speech that focuses on police departments (and ultimately police protection and public safety) involve matters of great public concern." Delgado, 282 F.3d at 517, *citing* Glass v. Dachel, 2 F.3d 733, 741 (7th Cir. 1993).

The petitioner complains the Seventh Circuit's general determinations on content as applied to Delgado has the potential for sweeping almost anything a police officer says during the course of their duties as being protected by the First Amendment. However, petitioner did not dispute the content of respondent's speech related to a matter of public concern in filing his motion for summary judgment with the district court. Delgado, 277 F.Supp. 2d at 961. Instead, at summary judgment, petitioner focused on a "form and context" argument contending that Delgado's speech did not address a matter of public concern as it was made in the course of his assigned duties. Id. What petitioner really wants by petitioning this Court is for this Court to establish a per se rule exempting statements made in the course of a police officer's official duties from the protection of the First Amendment.

The Seventh Circuit recognized petitioner's request from the start. Delgado, 282 F.3d at 519-20. The petitioner again disguises this request by arguing that the Seventh Circuit's decision in Gonzalez v. City of Chicago, 239 F.3d

939 (7th Cir. 2001), is in conflict with the Delgado decision, and that various other decisions by other circuit courts concerning the speech of a public employee conducting routine duties creates confusion on what speech is considered routine versus non-routine. By doing so, the petitioner argues this Court must define that speech which is routine versus non-routine. This is despite the fact this Court's analysis is to determine if the speech is on a "matter of public concern," not whether it was "routine" or "non-routine."

As such, the petitioner's argument focuses incorrectly on the phrase "routine." This Court has set forth factors to determine the "form and context . . . can be clarified by an examination of an employee's motivation." Delgado, 277 F.Supp.2d at 961. More specifically, under the Connick inquiry, this requires the lower courts "to look to the point of the speech in question: was it the employee's point to bring wrongdoing to light? Or was the point to further some purely private interest?" Delgado, 282 F.3d at 518, *citing* Linhart v. Glatfelter, 771 F.2d 1004, 1010 (7th Cir. 1985).

Therefore, in opposite to petitioner's argument that the Seventh Circuit's decisions in Gonzalez and Delgado cannot be easily distinguished, this court's inquiry set forth in Connick concerning an employee's motivation already provides lower courts with a uniform procedure to evaluate an employee's speech based on form and context. Moreover, the Seventh Circuit correctly followed the Connick inquiry. More specifically, in Gonzalez, the employee's speech was a routine duty that did not touch on a matter of public concern because his speech was "'clearly acting *entirely* in an employment capacity when he made those reports,' Gonzalez, 239 F.3d at 941 (emphasis added), and that he 'could have been fired had he *not* produced the reports.' Id.

at 942 (emphasis added)." Delgado, 282 F.3d at 518-19. In short, it was not Gonzalez' point to bring wrongdoing to light, but to further a purely private interest in keeping his job by performing his duty. In reaching this conclusion, the Seventh Circuit concluded that an employee's speech or expression in addition to objectively promoting or protecting a matter of public concern must also be a product of some independent discretion or judgment showing there was some motive on the part of the employee to bring wrongdoing to light. Id. at 519, *citing* Gonzalez, 239 F.3d at 941. In making this distinction, the Seventh Circuit clarified in Gonzalez that, "we are not 'establishing a per se rule exempting statements made in the course of official duties from the protection of the First Amendment.'" Id., *citing* Gonzalez, 239 F.3d at 942; (*quoting* Koch v. City of Hutchinson, 847 F.2d 1436 (10th Cir. 1988)).

In comparison, the Seventh Circuit determined Delgado's actions were not a routine discharge of an assigned duty as the petitioner himself said Delgado should not have been investigating the matter in question. (Pet. App. 2). Further, the Seventh Circuit found Delgado exercised a great deal of discretion because he decided to bring the matter up with his supervisor in the first place which was not the usual process, he decided to show a supervisor the actual letter he received instead of simply summing it up and omitting information in relation to petitioner, and he recommended to his supervisor that an independent investigation be conducted. Id. More specifically, Delgado was troubled by the information contained in Mullins' letter and he took steps to bring the allegations to light with his superiors because he believed the matter should not simply be disregarded. Delgado, 277 F.Supp.2d at 962. (Pet. App. 30-31).

The difference between Delgado and Gonzalez is that Gonzalez wrote his reports with no purpose in mind other than to comply with his duties. Delgado, 282 F.3d at 518-19. (Pet. App. 15). Delgado disclosed Mullins' information for the purpose it was on a matter of public concern and should be investigated. Id. Further, Delgado made this disclosure although he had discretion to not investigate the information and no one would have been the wiser of it. Delgado, 282 F.3d at 519. (Pet. App. 15-16). Contrary to petitioner's position, Delgado and Gonzalez are distinguishable and both decisions are in conformity with the mandates of Connick.

Likewise, petitioner's argument that the Eleventh Circuit's decision of Morris v. Crow, 142 F.3d 1379 (11th Cir. 1998), is in conflict with Delgado, and therefore, requires this Court's intervention is misplaced. In making this argument, petitioner claims it is impossible to distinguish Delgado's from Morris' discharge of duties. However, the evidence in Morris showed that a sheriff's deputy generated an accident report out of the normal course of his duties as an accident investigator without any indication it was his point to bring wrongdoing to light versus to further some purely private interest in conducting his routine duties. Delgado, 282 F.3d at 520; (Pet. App. 18-19). In comparison, Delgado had discretion to disclose and chose to do so, and Jones knew that when he chose to act with an undesirable transfer for Delgado. (Pet. App. 2-3).

Moreover, petitioner's argument that Branton v. City of Dallas, 272 F.3d 730 (5th Cir. 2001) is another example of a circuit court's decision being at odds with this Court because First Amendment protection was given to a police officer for speech occurring on the job is incorrect. This Court's precedence establishes that when a public employee speaks on a matter of public concern, they may be entitled to

First Amendment protection. Connick, 461 U.S. at 147. The Fifth Circuit recognized this in Branton and reviewed Branton's speech based on its content, form and context as required by Connick. Branton, 272 F.3d at 739-40. Petitioner's argument that this Court prohibits an employee's speech from ever rising to the level of speaking "as a citizen" is contrary to what this Court dictates in Connick. Moreover, to adopt such a policy has the possibility of swallowing the First Amendment's safeguard that currently allows information to reach the public debate to check government agencies.

Petitioner next argues the Sixth Circuit dismissed a fraud investigator's First Amendment claim because his speech was not protected as he was acting in the course of his employment in speaking with outside investigators. However, the Sixth Circuit dismissed the fraud investigator's First Amendment claim because his speech on the investigation was confidential, and he was previously warned by his supervisor not to pursue the matter without going through appropriate department procedures concerning his duties as an employee. Thomson v. Scheid, 977 F.2d 1017, 1021 (6th Cir. 1992). The truth is, the fraud investigator had an opportunity to file an appropriate complaint by following department procedures, but declined to file any complaint. Id., at 1019. In contrast, respondent had discretion to disclose information about potential crimes, and after doing so followed all department procedures, but was still retaliated against by petitioner. Delgado, 277 F.Supp.2d at 964. (Pet. App. 35). More specifically, respondent "conveyed the information in a manner that was professional and deferential and in an appropriate time and place." Id.

Additionally, petitioner's argument the Sixth Circuit further confuses whether a public employee has the right to free speech based on activities arising from their job is inaccurate. In Taylor v. Keith, 338 F.3d 639 (6th Cir. 2003), the Sixth Circuit evaluated whether Taylor's speech was on a matter of public concern by following the well-established factors set forth by this court in Connick. Taylor, 388 F.3d at 644. More specifically, the Sixth Circuit acknowledged, "[W]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the record as a whole." Id., *citing* Connick, 461 U.S. at 147-48, 103 S.Ct. 1684. As such, because Taylor's speech was on alleged police brutality, a matter of inherent public concern, and was for the purpose to bring to light actual or potential wrongdoing or a breach of public trust, it was protected. Id.

In contrast, the Sixth Circuit in Taylor distinguished the defendants' reliance upon Thomson that when a public employee speaks in his role as a public employee, his speech cannot touch on a matter of public concern. Id. What petitioner ignores is that the Sixth Circuit in Taylor, pointed out that in its prior decision in Thomson that, "[n]ot all matters discussed within a government office are of public concern, and thus internal office communication does not *necessarily* give rise to a constitutional claim." Id., *citing* Thomson, 977 F.2d at 1020-21. (emphasis added). However, this:

> [D]id not purport to strip public employees of the First Amendment's protection for all speech that occurs in the course of employment. Rather, Thomson simply implies that the context of the speech (i.e., whether an employee speaks in the course of

> his employment) is relevant to, but not determinative of, whether the speech touches on a matter of public concern.

Id., at 644-45.

The Sixth Circuit then went on to state, "a public teacher's speech, made in the role of employee, is protected so long as the speech itself addresses a matter of public concern." Id., at 645, *citing* Cockrel, 270 F.3d at 1052. In making this distinction, the Sixth Circuit recognized, "that the Supreme Court made clear in Connick that 'the key question is not whether a person is speaking in his role as an employee or citizen, but whether the employee's speech in fact touches on a matter of public concern.'" Id. As such, the Sixth Circuit joins with the Seventh Circuit in rejecting the same argument petitioner makes requesting this Court to set guidelines limiting First Amendment protection for speech that is part of a public employee's duties. To the contrary, this Court has already established the guidelines to analyze whether a public employee's speech is on a matter of public concern, as was recognized by the Seventh Circuit in this case. Delgado, 282 F.3d at 519-520. (Pet. App. 14-17).

Similarly, petitioner's reliance upon Judge O'Scannlain's concurring opinion in Ceballos v. Garcetti, 361 F.3d 1168 (9th Cir. 2004) ignores that the majority applied:

> [A] two-step test that stems from the Supreme Court's holdings in Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), and Pickering v. Bd. of Educ., 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968): (1) we ask whether the

> speech addresses a matter of public concern, and, if it does, (2) we engage in an inquiry, commonly known as the Pickering balancing test, . . .

Ceballos, 361 F.3d at 1173, *citing* Rivero v. City & County of San Francisco, 316 F.3d 857, 865 (9th Cir. 2002) (quoting Hufford v. McEnaney, 249 F.3d 1142, 1148 (9th Cir. 2001)).

The Ceballos court then went on to determine if the public employee's speech addressed a matter of public concern by reviewing the speech in light of "the content, form, and context" of the speech. Id. In doing so, the Ceballos court stated, "[a] public employee addresses a matter of public concern when his speech relates to an issue of 'political, social, or other concern to the community.'" Id., *citing* Brewster v. Bd. of Educ. of the Lynwood Unified Sch. Dist., 149 F.3d 971, 978 (9th Cir. 1998), (quoting Connick, 461 U.S. at 146, 103 S.Ct. 1684); *see also* Johnson v. Multnomah County, 48 F.3d 420, 422 (9th Cir. 1995). From there, the Ceballos court stated:

> What is critical under Connick, as we explained in Roth v. Veteran's Admin. of the United States, is the "point of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?"

Id., at 1174, *citing* Roth, 856 F.2d 1401, 1406 (9th Cir. 1988).

The fact petitioner makes the same argument as set forth in the concurring opinion in Ceballos is the same argument rejected by the majority in that very case. Ceballos, 361 F.3d at 1175-78. More specifically, the majority stated:

> The right of public employees to speak freely on matters of public concern is important to the orderly functioning of the democratic process, because public employees, by virtue of their access to information and experience regarding the operations, conduct, and policies of government agencies and officials, "are positioned uniquely to contribute to the debate on matters of public concern." Weeks v. Bayer, 246 F.3d 1231, 1235 (9th Cir. 2001) (quoting Gilbrook v. City of Westminster, 177 F.3d 839, 870 (9th Cir. 1999)). Stripping them of that right when they report wrongdoing or other significant matters to their supervisors would seriously undermine our ability to maintain the integrity of our governmental operations.

Id., at 1175.

The majority in Ceballos, recognized that the concurrence was, like the petitioner in this case, requesting a "per se" rule to prohibit First Amendment protection to employees resulting from "routine" job functions. However, the majority stated a:

> [P]er se rule stripping all First Amendment protection from speech uttered in the

> performance of routine, as opposed to non-routine, job functions would be inconsistent with the very nature of the Connick test which contains a second step that requires us to balance various factors, including some of those that concern our concurring colleague.

Id. at 1177-78.

More specifically, the majority held that:

> [R]egardless of the form in which a government worker makes charges of corruption, criminal misconduct, or public waste, such charges raise serious public concerns that merit careful assessment and justify full application of the Connick principles. Indeed, a report that would ordinarily be considered routine by virtue of its form may well become non-routine by virtue of its content, such as when it contains serious charges of official wrongdoing.

Id., at 1177.

As such, the majority in Ceballos held that, "whether a job duty is routine or non-routine is a far less important factor for purposes of First Amendment analysis than the content of the public employee's speech." Id. Further, the majority held that:

> [U]nlike our colleague, we do not perceive any "deep confusion" in the other circuits; rather, these cases point to the nearly

> unanimous opposition of the federal courts to the imposition of a per se rule denying all First Amendment protection to public employees' speech pursuant to their job-related duties.

Id.

In making this quote, the Ninth Circuit compared in part Gonzalez v. City of Chicago, 239 F.3d 939, 941-42 (7th Cir. 2001), with Delgado v. Jones, 282 F.3d 511, 519 (7th Cir. 2002).

As the Ceballos majority stated,

> [N]ot only our own precedent, but sound reason, Supreme Court doctrine, and the weight of authority in other circuits support our rejection of a per se rule that the First Amendment does not protect a public employee simply because he expresses his views in a report to his supervisors or in the performance of his other job-related obligations. Such speech, like all other public employee speech, is subject to the full two-part Connick test described above.

Id., at 1178.

Petitioner's argument amounts to a request for a per se rule and must be rejected because such a rule would be contrary to the doctrine established by this Court, and would deny First Amendment protection to public employees' speech resulting from job-related duties. If that were to occur, the very persons most knowledgeable and informed of

operations, conduct, and policies of public agencies and its officials would be silenced, and a major safeguard to prevent corruption in our democratic society would be lost. Respondent respectfully requests that this Court deny petitioner's request for such a per se rule by rejecting his Writ of Certiorari.

II. The Seventh Circuit Rejected Jones' Request for Qualified Immunity Based on Clearly Established Law that his Conduct was Unlawful in the Situation He Confronted.

This Court has held, "Qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.'" Saucier v. Katz, 533 U.S. 194, 200, 121 S.Ct. 2151, 2156 (2001) (citing Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). From this premise the "threshold question: taken in the light most favorable to the party asserting injury, do the facts alleged show the officer's conduct violated a constitutional right?" Id. at 201, 2156. If a constitutional right is violated, then the next question is, "whether the right was clearly established." Id.

> A right is "clearly established" when the contours of the right are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." Saucier, 533 U.S. at 202, 121 S.Ct. 2151. To determine whether qualified immunity applies, we must consider the application of the right in the specific context in question. Brewster, 149 F.3d at 977. This does not mean "that an official action is protected by qualified immunity unless the very action in

> question has previously been held unlawful," however, but rather that "in the light of pre-existing law the unlawfulness must be apparent." Hope v. Pelzer, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (internal quotation marks and citations omitted). Indeed, " '[o]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.'" Id., at 741, 122 S.Ct. 2508. In order to find that the law was clearly established, then, "we need not find a prior case with identical, or even 'materially similar,' facts." Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1136-37 (9th Cir. 2003) (quoting Hope, 536 U.S. at 741, 122 S.Ct. 2508). Instead, we must "determine whether the preexisting law provided the defendants with 'fair warning' that their conduct was unlawful." Id., at 1137 (quoting Hope, 536 U.S. at 741, 122 S.Ct. 2508).

Ceballos, 361 F.3d at 1180.

As such, based on the principles set forth by this Court, the Seventh Circuit to deny petitioner qualified immunity had to find petitioner as a reasonable official understood that what he was doing violated the clearly established right as determined by preexisting law. Id. Contrary to petitioner's argument, this does not mean there must be a case identical or even materially similar to the facts he confronted, but merely means in the light of preexisting law, his unlawfulness must have been apparent to him. Id.

Nonetheless, petitioner further argues the Seventh Circuit failed to refer to any particular factual circumstance he faced in denying his request for qualified immunity. To the contrary, the Seventh Circuit specifically stated:

> Delgado was singled out by the former arrestee and given information on alleged criminal activity. Once this information was reduced to the "Matter of" memorandum, it was forwarded by Delgado's captain to Deputy Chief Ray with a recommendation that any subsequent investigation be performed by an outside law enforcement agency. Such a situation is certainly not routine. Moreover, because the subject of Delgado's communication was highly relevant to an independent and objective investigation of criminal activity and was not motivated by the personal interests of Delgado--in short, it was a matter of public concern--a public official knowledgeable about relevant case law could not have reasonably believed that he was free to retaliate by ordering an unwanted transfer to a less desirable job or by the manipulation of Delgado's vacation schedule.

Delgado, 282 F.3d at 520-21. (Pet. App. 19).

Although petitioner complains the Seventh Circuit did not analyze the facts he confronted, it did so and applied those facts to well-established principles observing, "[I]t has been well established for many years in this Circuit that a public employer may not retaliate against an employee who exercises his First Amendment speech rights, including in

particular retaliation through a transfer to a less desirable position." Id. at 520, *citing* Gustafson v. Jones, 117 F.3d 1015, 1020 (7th Cir. 1997). It should also be noted that petitioner was aware of this principle, as he was a defendant in Gustafson. Delgado, 282 F.3d at 520 n. 4.

Further, petitioner's argument that the Seventh Circuit's review of the two cases he relied on to request qualified immunity is lacking in its review of the particular factual context of the cases ignores the clearly established right he violated. First, the Seventh Circuit rejected petitioner's argument that he relied upon Gonzalez, because his actions occurred about eight months before the Seventh Circuit's decision in Gonzalez thereby eliminating any possibility of his reliance on that decision. Delgado, 282 F.3d at 520. Additionally, the Seventh Circuit rejected petitioner's qualified immunity argument as relying on Morris v. Crow, 142 F.3d 1379 (11th Cir. 1998), because

> [T]he Eleventh Circuit in Morris, also expressed concern that routine public duties should not be elevated to a protected status under the First Amendment, lest every remark by a government employee "plant the seed of a constitutional case." 142 F.3d at 1382 (quoting Connick, 461 U.S. at 149, 103 S.Ct. 1684). Although concerns of efficiency may require a safe harbor for personnel decisions that are made against the backdrop of an employee's routine job duties, this category is narrow and cannot be permitted to swallow the First Amendment. No doubt government efficiency can be equally compromised if government supervisors can freely pursue retaliation for

> speech that is politically sensitive or embarrassing.

Id. (Pet. App. 19).

In other words, a reasonable public official would know there was no per se rule excluding comments made by an employee as part of routine duty from First Amendment protection, and that a public employee's speech on a matter of public concern was protected by the First Amendment. Therefore, petitioner as a reasonable official was provided with fair warning that his conduct under these circumstances was unlawful.

Further, petitioner's reliance on Dirrane v. Brookline Police Dept., 315 F.3d 65 (1st Cir. 2002), for the premise that the First Circuit provided the defendant qualified immunity because there was no comparable previously decided case establishing defendant was acting unconstitutionally is not persuasive. To begin with, the Seventh Circuit, contrary to petitioner's argument, specifically reviewed the factual circumstances he faced. Delgado, 282 F.3d at 520-21. Additionally, the plaintiff's transfer in Dirrane occurred some five years after his alleged speech. The plaintiff's complaints were nestled in a morass of complaints, the defendants had some basis for distrusting the plaintiff's judgment, and a reasonable department head could have concluded, even if mistakenly, they were dealing with someone who would make up anything to get attention. Dirrane, 315 F.3d 67-71. Simply put, these facts unlike those in this case, do not fit under any clearly established law in which a reasonable official would have known they were violating an employee's speech on a matter of public concern.

Petitioner's argument that the Tenth Circuit's decision in Dill v. City of Edmond, 155 F.3d 1193 (10th Cir. 1998) reinforces a lack of clarity in approaches among the circuits on this issue is without basis. A review of Dill specifically addresses that the Tenth Circuit considered the facts set forth in the complaint with the preexisting case law and found the defendants should have known it would be unconstitutional to transfer plaintiff from detective to patrol officer and to alter his weekend duty schedule in retaliation for his speech. Dill, 155 F.3d at 1205. To argue the Tenth Circuit ignored the specific facts facing the defendants in its consideration of qualified immunity in Dill is as disingenuous as petitioner's argument the Seventh Circuit failed to consider the facts and circumstances facing him in this case.

Likewise, petitioner's reliance on Stanley v. City of Dalton, 219 F.3d 1280 (11th Cir. 2000), is distinguishable from the case at hand. In Stanley, the Eleventh Circuit found the defendant Chief had an undisputed lawful basis for terminating Stanley. Id., at 1296. In this case, petitioner did not present any undisputed lawful basis for transferring respondent to an unwanted and undesirable position. (Pet. App. 1-37). To the contrary, at his deposition, the petitioner claimed he was concerned about respondent violating a confidentiality rule of the Milwaukee Police Department by disclosing to Mullins during his interrogation of her that the police department found out about her drug house as a result of a complaint to the Mayor's office. However, petitioner's alleged concern did not come about until after he decided to transfer respondent. (Record 53, Meuler Dep., pp. 50-51, 55; Schunk Dep., pp. 45-46).

In addition, petitioner's alleged concern is a manufactured afterthought, as the record shows petitioner

questioned Captain Meuler on, "Who the hell was Detective Delgado to think he would investigate this?" (Pet. App. 24). Immediately followed by petitioner indicating to Captain Meuler and everyone else in the room that he was going to transfer Delgado. (Id.). Then following petitioner's dismissal of Meuler from this meeting, petitioner initiated a criminal investigation that later turned into an internal rules investigation against Delgado. (Record 53, Schunk Dep., 42-46) An investigation in which Captain Thompson of the Internal Affairs Division reached a conclusion on June 20, 2000 that there was no evidence of any violation of the confidentiality rule by Detective Delgado. (Record 53, at Dep. Ex. 9). This was because even though respondent made mention of the Mayor's office, he did not divulge the name of any specific complainant. (Id.). More specifically, informing an arrestee that the police knew of her drug activity from a complaint to the Mayor's office to get a confession is in conformity with Milwaukee Police Department policies and procedures so long as the identity of the person complaining to the Mayor's office is not divulged. (Record 50, at ¶¶ 5-11). As such, unlike the defendant Chief in Stanley, there is no undisputed basis for petitioner to claim that he lawfully ordered an unwanted and undesired transfer to Delgado.

Further, Jones complains the Stanley court reviewed other cases and the Seventh Circuit did not. Petitioner's argument ignores the Seventh Circuit reviewed the well-established law of the Seventh Circuit and under the facts and circumstances facing petitioner, no "public official knowledgeable about relevant case law could not have reasonably believed that he was free to retaliate by ordering an unwanted transfer to a less desirable job or by the manipulation of Delgado's vacation schedule." Delgado, 282 F.3d at 521; (Pet. App. 19).

Petitioner's reliance on Kinney v. Weaver, 367 F.3d 337 (5th Cir. 2004) is also of no help to him. The petitioner relies on Kinney claiming the Fifth Circuit followed this Court's guidelines as set forth in Saucier and in Hope v. Pelzer, and that the Fifth Circuit took a general doctrine and applied it to a particular factual context of a lawsuit and found that based on the general principle, and the facts confronting the public official, the official was on notice that their conduct violated established law. However, petitioner's argument ignores the Seventh Circuit took the general principle that it had "determined that police protection and public safety are generally a matter of public concern", and that "it would be difficult to find a matter of greater public concern in a large metropolitan area than police protection and public safety." Delgado v. Jones, 282 F.3d at 517; (Pet. App. 12). In addition, the Seventh Circuit considered the general principle that, "It has been well established for many years in this Circuit that a public employer may not retaliate against an employee who exercises his First Amendment speech rights, including in particular retaliation through a transfer to a less desirable position." Id., at 520, *citing* Gustafson, 117 F.3d at 1020. (Pet. App. 17-18). From there, the Seventh Circuit considered the factual situation facing Jones and found that based on these general principles, as "a public official knowledgeable about relevant case law could not have reasonably believed he was free to retaliate by ordering an unwanted transfer to a less desirable job or by the manipulation of Delgado's vacation schedule." Id., at 521; (Pet. App. 19).

Likewise, petitioner's reliance upon Rivera-Jimenez v. Pierluisi, 362 F.3d 87 (1st Cir. 2004), actually cuts against him for the same reasons. A review of the Seventh Circuit's decision in Delgado only shows the Seventh Circuit applied

this Court's guidelines in evaluating qualified immunity. The fact petitioner does not like that decision does not entitle him to a review of his case by this court.

CONCLUSION

For all of the foregoing reasons, the respondent, Octavio Delgado, respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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